

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Applicant:

GABI BEN AMI

Serial No.: 10/617,036

Filed: July 11, 2003

For: Unstable Bottle

Examiner: Stephen J Castellano

FOR OFFICIAL USE ONLY

Group Art Unit: 3727

Attorney

Docket: 3015/2

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COVER SHEET FOR FAX TRANSMITTAL

Commissioner of Patents and Trademarks
Washington, D.C. 20231

Dear Sir:

Transmitted herewith: - in triplicate is the APPEAL BRIEF

- in duplicate is the APPEAL BRIEF FEE SHEET

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I HEREBY CONFIRM THAT THIS DOCUMENT (55 PAGES IN TOTAL) IS BEING FORWARDED TO FAX: (571-273-8300) ON APRIL 3, 2006

Signed: _____ (Gina Barzilai)

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Group Art Unit: 3727

Attorney

Docket: 3015/2

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APR 03 2006**TRANSMITTAL OF APPEAL BRIEF**Commissioner of Patents and Trademarks
Washington, D.C. 20231

Dear Sir:

Transmitted herewith in triplicate is the APPEAL BRIEF in this application with respect to the Notice of Appeal filed on February 1, 2006.

The application is on behalf of:

☐ other than a small entity☒ small entity

verified statement:

☐ attached☒ already filed

Pursuant to 37 CFR 1.17(f) the fee for filing the Appeal Brief is:

☒ small entity \$ 250☐ other than a small entity \$ 500


Appeal Brief fee due \$ 250

Please charge Account No. 06-2140 the sum of \$250. A duplicate copy of this transmittal letter is attached.

If any additional extension and/or fee is required, this is a request therefor and to charge Account No. 06-2140.

If any additional fee for claims is required, please charge Account No. 06-2140.

Respectfully submitted,



Mark M. Friedman
Attorney for Applicant
Registration No. 33,883


Appeal Brief fee due \$ 250

Please charge Account No. 06-2140 the sum of \$250. A duplicate copy of this transmittal letter is attached.

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Respectfully submitted,



Mark M. Friedman
Attorney for Applicant
Registration No. 33,883

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Applicant:

Gabi Ben-Ami

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THE UNIVERSITY OF CHICAGO

Group Art Unit: 3727

Attorney
Docket: 3015/2

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APR 03 2006

Commissioner for Patents
PO Box 1450
Alexandria, Virginia 22313-1450
ATTENTION: Board of Patent Appeals and Interferences

APPELLANT'S BRIEF

Sir:

This is in furtherance of the Notice of Appeal filed in this case on February 1, 2006. The fees required under § 1.17(c) and any required petition for extension of time for filing this brief and fees therefor are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

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I. REAL PARTY IN INTEREST

The real party of interest in this application are the inventors, Gabi Ben-Ami and Uri Adoni.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

III. STATUS OF CLAIMS

The claims under appeal are claims 1-10 and 20-25.

The status of the claims in this application is as follows:

- Claims 1, 2, 4, 6-9, 20-23 and 25 are rejected.
- Claims 3, 5, 10 and 24 are withdrawn from consideration.
- Claims 11-19 are canceled.

IV. STATUS OF AMENDMENTS

No amendments were filed subsequent to the final rejection mailed September 1, 2005.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention defined by independent claim 1 under appeal is an unstable receptacle (Title, Figures 1-3) for storing and dispensing a beverage. As shown in Figures 1-3, the receptacle includes a container 12 having an opening 14 (page 5, lines 16-20), the container holding a volume of a beverage selected from the group consisting of an alcoholic beverage and a carbonated beverage, both exemplified by beer (page 1, lines 7-9). The container is formed, such that, when placed in any orientation upon a level surface, at least one third of the volume of the beverage spills

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out of the container (page 6, lines 2-5). A closure arrangement 16 initially seals the beverage within the container and openable for dispensing the beverage (Figure 2 and page 5, lines 19-21).

The invention defined by independent claim 20 under appeal relates to the embodiment of an unstable receptacle shown in Figure 3, and described particularly from page 6, line 14 through page 7, line 7. This embodiment includes a metal can (page 6, line 18) configured for sealingly containing the volume of a beverage. The metal can is formed with a ring pull device 28 (page 6, lines 17-19) configured for non-resealably opening the can in such a manner as to form an opening 25. The metal can is configured such that, after opening, when the metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of the metal can (page 6, line 22 through page 7, line 2).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection to be reviewed on appeal are as follows:

1. Claims 1, 7-9 and 25 stand rejected under 35 USC § 102(b) as being anticipated by Nohara et al. (US 4,741,936).
2. Claims 2, 4, 6 and 20-23 stand rejected under 35 USC § 103(a) as being unpatentable over Nohara et al. in view of Esposito (US 5,071,042) and Diekhoff et al. (US 5,718,352).
3. Claims 1, 2, 4, 6-9, 20-23 and 25 stand rejected under 35 USC § 103(a) as being unpatentable over Esposito in view of Nohara et al.

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VII. ARGUMENTS

In the arguments presented below, various claims will be grouped together for clarity and conciseness of presentation of the issues before the Board of Patent Appeals and Interferences. To the extent that such grouping is interpreted by the Board as a waiver of separate consideration for the grouped claims, it should be noted that any such waiver is effective only for the purpose of simplifying the issues and reducing attorney costs in the present appeal proceedings, and does not constitute any admission beyond the aforementioned scope. Furthermore, any such waiver is effective only in relation to the rejections of record. The Applicant reserves the right to withdraw any such waiver in the event that any new grounds for rejection are introduced during the appeal procedure.

Introductory Comments

The present invention relates to a receptacle for beverages which provides added entertainment and novelty value through its highly unusual quality of being unstable such that, once started, it generally cannot be put down without spilling until most of the contents are finished. The invention thus also provides a catalyst for social interaction by requiring people to hold each other's drinks whenever one needs to perform an action requiring two free hands.

It is the Appellant's conviction that none of the art of record, when considered either alone or in combination, in any way teaches or suggests this primary inventive concept. The details of the specific rejections of record will now be addressed.

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Atty. Dkt. 3015/2**A. Grounds of Rejection I – 35 USC § 102(b) (Nohara et al.)**

The Examiner has rejected claims 1, 7-9 and 25 under 35 USC § 102(b) as being anticipated by Nohara et al. (US 4,741,936). Appellant's arguments against these grounds of rejection are presented below.

The fundamental issue underlying all of the Examiner's rejections and the Appellant's counter-arguments is the interpretation of the Nohara et al. reference (hereafter "Nohara"). The Examiner's rejections are all premised on the assertion that Nohara teaches an unstable bottle for beverages. The Applicant submits that the Examiner has misconstrued the teachings of Nohara et al., and that the reference does not in fact teach any unstable bottle for containing a beverage.

Nohara teaches a "laminare preform" as a blank for producing multi-layer polyester bottles, and a corresponding production process. The document proposes an improvement to conventional draw-blow-forming of bottles by addition of intermediate layers of resin in the blank to reduce gas permeability. Figures 6 and 7 show two stages of the production process terminating in a bottle within a mold, and Figure 8 shows the round-bottomed bottle after removal from the mold.

The Examiner has pointed to Figure 8 as showing a round-bottomed bottle, thereby allegedly anticipating (or in the later rejections, rendering obvious) the unstable bottle of the present invention. Specifically, on page 2 of the Official Action mailed September 1, 2005, the Examiner stated:

Nohara discloses an unstable receptacle (bottle) for storing and dispensing a carbonated beverage, a lid is placed on the neck finish of the bottle to seal the beverage within the bottle. The container has a hemispherical shaped base. The height of the bottle appears to be high enough that the center of gravity is above the center of curvature of the hemispherical base.

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Thus, the Examiner's rejections are premised on an assumed mode of use of the bottle of Figure 8 in which the round bottomed bottle is taken, as is, without further modification, filled with a carbonated beverage, and sealed with a lid. Such a mode of use would be highly unusual in the context of the background art since it runs contrary to the accepted practice over hundreds of years according to which beverage bottles have always been made to stand stably. Even more mysteriously, the Nohara reference remains completely silent regarding this highly unusual feature which departs markedly from the norms of beverage container design.

The Examiner appears, in his rejections, to be oblivious to the common practice predominant in the field of beverage retail over a period of at least a decade during the 1980s and 1990s according to which blow-molded polymer bottles were initially formed with a round base and a stabilizing base element was then added to make the bottles stand upright. Anyone ordinarily skilled in the art, or even an unskilled layman, reading the document of Nohara would be left in no doubt whatsoever that Nohara is referring to a "bottle" which is to be used by addition of a stabilizing base so as to render the final bottle stable. As is common in patent documents, the Nohara document relates only to those aspects of the technology which are relevant to the laminated bottle production, and omits discussion of other aspects which are well known and irrelevant to the point of novelty. Thus, discussion of the stabilizing base is unnecessary in the same way as is discussion of providing a screw cap.

In order to redress the Examiner's apparent ignorance of the well known practice during the 1980s and 1990s, the Applicant submitted a declaration of Mr. Gideon Feiner, the CEO of Polymer Logistics, and an expert with more than 20 years experience in production and marketing of a wide range of plastic products. This

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declaration, clearly establishes and makes of record a correct reading of the Nohara reference, a reading which the Appellant submits should have been self-evident to the Examiner himself.

Referring now more formally to the § 102(b) rejections, the MPEP in Section 706.02 states that, "...for anticipation under 35 U.S.C. 102, the reference must teach every aspect of the claimed invention either explicitly or impliedly. Any feature not directly taught must be inherently present." [emphasis added]

Independent claim 1 under appeal recites, among other limitations:

- "a container ... formed, such that, when said container is placed in any orientation upon a level surface, at least one third of the volume of said beverage spills out of said container"; and
- "a closure arrangement initially sealing said beverage within said container ...".

The Appellant submits that both the closure and the stabilizing base are implicit in the Nohara document to the same extent. The explicit teachings of Nohara do not include either the closure or the stabilizing base, and therefore do not anticipate the claim. If the features necessary to render the product of Nohara practically useful are considered to be "inherently present" for the purpose of § 102(b), these would include both a closure for the threaded neck and a stabilizing base for the round bottom, such that the teachings of Nohara would fail to anticipate the unstable container definition. Thus, the Appellant respectfully submits that there is no basis for a rejection of claim 1 or any of its dependent claims 7-9 or 25 under § 102(b) based on Nohara.

For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's first grounds of rejection.

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Atty. Dkt. 3015/2**B. Grounds of Rejection II – 35 USC § 103(a) (Nohara, Esposito, Diekhoff)**

The Examiner has rejected claims 2, 4, 6 and 20-23 under 35 USC § 103(a) as being unpatentable over Nohara et al. in view of Esposito (US 5,071,042) and Diekhoff et al. (US 5,718,352). Appellant's arguments against these grounds of rejection will be presented below according to groups of claims as identified in the subheadings following.

1. Claims 2 and 4

Claims 2 and 4 are dependent from claim 1, which is believed to be patentable for the reasons stated above and below, thereby rendering claims 2 and 4 patentable in their present form. In addition to these arguments, the Appellant argues separately against Grounds of Rejection II as applied to claims 2 and 4 as follows.

The Examiner's rejections of claims 2 and 4 are based on a modification of the bottle of Nohara to employ a non-resealable seal or a ring-pull device according to the teachings of Esposito. In response, the Appellant submits that, according to conventional thinking, a non-resealable seal would in fact be considered inferior to a resealable screw cap as implied by Nohara. Furthermore, the ring-pull of Esposito is chosen for its synergy with use of a metal can, and would not normally be chosen for a plastic bottle. The Examiner has therefore failed to demonstrate any motivation to combine the references, thus failing to meet the requirements for a valid *à priori* obviousness rejection.

2. Claim 6

Claim 6 is dependent from claim 1, which is believed to be patentable for the reasons stated above and below, thereby rendering claim 6 patentable in its present

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form. In addition to these arguments, the Appellant argues separately against Grounds of Rejection II as applied to claim 6 as follows.

The Examiner's rejection of claim 6 is based on a proposed modification of the bottle of Nohara according to which the bottle would be made from metal according to the teachings of Esposito or Diekhoff. This modification, however, would be contrary to the explicit teachings of Nohara which presents a solution for improving gas impermeability of plastic bottles as a preferred option over the metal containers discussed in the background section.

3. Claims 20-23

Independent claim 20 recites a metal can with a ring-pull device and configured such that, after opening, when the metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of the metal can.

The Examiner's rejections of claims 20-23 are fundamentally based upon an assumption that Nohara teaches an unstable beverage container. As detailed above in the context of the § 102(b) rejections above, the Appellant submits that this assumption is erroneous, and that Nohara only discloses an intermediate work product which is to be used with a stabilizing base in a conventional manner. As a result, no reference of record teaches a beverage container which is unstable as claimed herein.

Furthermore, the Examiner's rejection of claim 20-23 is based on a modification of the bottle of Nohara according to which the bottle would be made from metal according to the teachings of Esposito or Diekhoff and would incorporate a ring-pull non-resealable closure. These modifications, however, would be contrary to the explicit teachings of Nohara which presents a solution for improving gas

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impermeability of plastic bottles as a preferred option over the metal containers discussed in the background section.

For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's second grounds of rejection.

C. Grounds of Rejection III – 35 USC § 103(a) (Esposito, Nohara)

The Examiner has rejected claims 1, 2, 4, 6-9, 20-23 and 25 under 35 USC § 103(a) as being unpatentable over Esposito in view of Nohara et al. Appellant's arguments against these grounds of rejection are presented below.

The Examiner has proposed a modification of Esposito in view of Nohara to provide a round-bottomed metal can.

In response, the Appellant submits that Nohara cannot be used to provide a motivation to modify another document to provide a round-bottom since:

- a) Nohara itself does not disclose an unstable bottle but rather merely an intermediate work product, as detailed above.
- b) Even according to the Examiner's argument, Nohara does not breathe a word about any unstable mechanical properties of his product or any advantage such properties would provide. Thus, there is no showing of motivation to modify Esposito according to any supposed unstable-bottle teaching of Nohara.

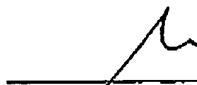
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For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's third grounds of rejection.

Respectfully submitted,



Mark M. Friedman
Attorney for Applicant
Registration No. 33,883

Date: April 3, 2006

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VIII. CLAIMS APPENDIX

1. An unstable receptacle for storing and dispensing a beverage, comprising:

- (a) a container having an opening, said container holding a volume of a beverage selected from the group consisting of an alcoholic beverage and a carbonated beverage, said container being formed, such that, when said container is placed in any orientation upon a level surface, at least one third of the volume of said beverage spills out of said container; and
- (b) a closure arrangement initially sealing said beverage within said container and openable for dispensing said beverage.

2. The receptacle of claim 1, wherein said closure arrangement is configured as a non-resealable seal.

3. The receptacle of claim 2, wherein said non-resealable seal is a crown cap.

4. The receptacle of claim 2, wherein said non-resealable seal is a ring-pull device.

5. The receptacle of claim 1, wherein said container is formed as a glass bottle.

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6. The receptacle of claim 1, wherein said container is formed as a metal can.
7. The receptacle of claim 1, wherein said container has a curved base.
8. The receptacle of claim 7, wherein said curved base has a center of curvature, said container having a center of gravity, said center of gravity being above said center of curvature when said opening of said container is oriented upwards.
9. The receptacle of claim 7, wherein said curved base is formed as a hemisphere.
10. The receptacle of claim 1, wherein said container has a base, said base having an image disposed thereon.
- 11-19. (canceled)
20. An unstable receptacle for storing a volume of a beverage, the receptacle comprising a metal can configured for sealingly containing the volume of the beverage, said metal can being formed with a ring pull device configured for non-resealably opening said metal can in such a manner as to form an opening, wherein said metal can is configured such that, after opening, when said metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of said metal can.
21. The receptacle of claim 20, wherein said metal can has a curved base.

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22. The receptacle of claim 21, wherein said curved base has a center of curvature, said metal can having a center of gravity, said center of gravity being above said center of curvature when said opening of said metal can is oriented upwards.

23. The receptacle of claim 21, wherein said curved base is formed as a hemisphere.

24. The receptacle of claim 20, wherein said metal can has a base, said base having an image disposed thereon.

25. The receptacle of claim 1, wherein said closure arrangement initially seals said beverage within said container together with a quantity of trapped gas at a pressure above atmospheric pressure.

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IX. EVIDENCE APPENDIX

NONE

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X. RELATED PROCEEDINGS APPENDIX

NONE

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APPELLANT'S BRIEF

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I. REAL PARTY IN INTEREST

The real party of interest in this application are the inventors, Gabi Ben-Ami and Uri Adoni.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

III. STATUS OF CLAIMS

The claims under appeal are claims 1-10 and 20-25.

The status of the claims in this application is as follows:

- Claims 1, 2, 4, 6-9, 20-23 and 25 are rejected.
- Claims 3, 5, 10 and 24 are withdrawn from consideration.
- Claims 11-19 are canceled.

IV. STATUS OF AMENDMENTS

No amendments were filed subsequent to the final rejection mailed September 1, 2005.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention defined by independent claim 1 under appeal is an unstable receptacle (Title, Figures 1-3) for storing and dispensing a beverage. As shown in Figures 1-3, the receptacle includes a container 12 having an opening 14 (page 5, lines 16-20), the container holding a volume of a beverage selected from the group consisting of an alcoholic beverage and a carbonated beverage, both exemplified by beer (page 1, lines 7-9). The container is formed, such that, when placed in any orientation upon a level surface, at least one third of the volume of the beverage spills

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out of the container (page 6, lines 2-5). A closure arrangement 16 initially seals the beverage within the container and openable for dispensing the beverage (Figure 2 and page 5, lines 19-21).

The invention defined by independent claim 20 under appeal relates to the embodiment of an unstable receptacle shown in Figure 3, and described particularly from page 6, line 14 through page 7, line 7. This embodiment includes a metal can (page 6, line 18) configured for sealingly containing the volume of a beverage. The metal can is formed with a ring pull device 28 (page 6, lines 17-19) configured for non-resealably opening the can in such a manner as to form an opening 25. The metal can is configured such that, after opening, when the metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of the metal can (page 6, line 22 through page 7, line 2).

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection to be reviewed on appeal are as follows:

1. Claims 1, 7-9 and 25 stand rejected under 35 USC § 102(b) as being anticipated by Nohara et al. (US 4,741,936).
2. Claims 2, 4, 6 and 20-23 stand rejected under 35 USC § 103(a) as being unpatentable over Nohara et al. in view of Esposito (US 5,071,042) and Diekhoff et al. (US 5,718,352).
3. Claims 1, 2, 4, 6-9, 20-23 and 25 stand rejected under 35 USC § 103(a) as being unpatentable over Esposito in view of Nohara et al.

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Atty. Dkt. 3015/2VII. ARGUMENTS

In the arguments presented below, various claims will be grouped together for clarity and conciseness of presentation of the issues before the Board of Patent Appeals and Interferences. To the extent that such grouping is interpreted by the Board as a waiver of separate consideration for the grouped claims, it should be noted that any such waiver is effective only for the purpose of simplifying the issues and reducing attorney costs in the present appeal proceedings, and does not constitute any admission beyond the aforementioned scope. Furthermore, any such waiver is effective only in relation to the rejections of record. The Applicant reserves the right to withdraw any such waiver in the event that any new grounds for rejection are introduced during the appeal procedure.

Introductory Comments

The present invention relates to a receptacle for beverages which provides added entertainment and novelty value through its highly unusual quality of being unstable such that, once started, it generally cannot be put down without spilling until most of the contents are finished. The invention thus also provides a catalyst for social interaction by requiring people to hold each other's drinks whenever one needs to perform an action requiring two free hands.

It is the Appellant's conviction that none of the art of record, when considered either alone or in combination, in any way teaches or suggests this primary inventive concept. The details of the specific rejections of record will now be addressed.

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A. Grounds of Rejection I – 35 USC § 102(b) (Nohara et al.)

The Examiner has rejected claims 1, 7-9 and 25 under 35 USC § 102(b) as being anticipated by Nohara et al. (US 4,741,936). Appellant's arguments against these grounds of rejection are presented below.

The fundamental issue underlying all of the Examiner's rejections and the Appellant's counter-arguments is the interpretation of the Nohara et al. reference (hereafter "Nohara"). The Examiner's rejections are all premised on the assertion that Nohara teaches an unstable bottle for beverages. The Applicant submits that the Examiner has misconstrued the teachings of Nohara et al., and that the reference does not in fact teach any unstable bottle for containing a beverage.

Nohara teaches a "lamine preform" as a blank for producing multi-layer polyester bottles, and a corresponding production process. The document proposes an improvement to conventional draw-blow-forming of bottles by addition of intermediate layers of resin in the blank to reduce gas permeability. Figures 6 and 7 show two stages of the production process terminating in a bottle within a mold, and Figure 8 shows the round-bottomed bottle after removal from the mold.

The Examiner has pointed to Figure 8 as showing a round-bottomed bottle, thereby allegedly anticipating (or in the later rejections, rendering obvious) the unstable bottle of the present invention. Specifically, on page 2 of the Official Action mailed September 1, 2005, the Examiner stated:

Nohara discloses an unstable receptacle (bottle) for storing and dispensing a carbonated beverage, a lid is placed on the neck finish of the bottle to seal the beverage within the bottle. The container has a hemispherical shaped base. The height of the bottle appears to be high enough that the center of gravity is above the center of curvature of the hemispherical base.

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Thus, the Examiner's rejections are premised on an assumed mode of use of the bottle of Figure 8 in which the round bottomed bottle is taken, as is, without further modification, filled with a carbonated beverage, and sealed with a lid. Such a mode of use would be highly unusual in the context of the background art since it runs contrary to the accepted practice over hundreds of years according to which beverage bottles have always been made to stand stably. Even more mysteriously, the Nohara reference remains completely silent regarding this highly unusual feature which departs markedly from the norms of beverage container design.

The Examiner appears, in his rejections, to be oblivious to the common practice predominant in the field of beverage retail over a period of at least a decade during the 1980s and 1990s according to which blow-molded polymer bottles were initially formed with a round base and a stabilizing base element was then added to make the bottles stand upright. Anyone ordinarily skilled in the art, or even an unskilled layman, reading the document of Nohara would be left in no doubt whatsoever that Nohara is referring to a "bottle" which is to be used by addition of a stabilizing base so as to render the final bottle stable. As is common in patent documents, the Nohara document relates only to those aspects of the technology which are relevant to the laminated bottle production, and omits discussion of other aspects which are well known and irrelevant to the point of novelty. Thus, discussion of the stabilizing base is unnecessary in the same way as is discussion of providing a screw cap.

In order to redress the Examiner's apparent ignorance of the well known practice during the 1980s and 1990s, the Applicant submitted a declaration of Mr. Gideon Feiner, the CEO of Polymer Logistics, and an expert with more than 20 years experience in production and marketing of a wide range of plastic products. This

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declaration, clearly establishes and makes of record a correct reading of the Nohara reference, a reading which the Appellant submits should have been self-evident to the Examiner himself.

Referring now more formally to the § 102(b) rejections, the MPEP in Section 706.02 states that, "...for anticipation under 35 U.S.C. 102, the reference must teach every aspect of the claimed invention either explicitly or impliedly. Any feature not directly taught must be inherently present." [emphasis added]

Independent claim 1 under appeal recites, among other limitations:

- "a container ... formed, such that, when said container is placed in any orientation upon a level surface, at least one third of the volume of said beverage spills out of said container"; and
- "a closure arrangement initially sealing said beverage within said container ...".

The Appellant submits that both the closure and the stabilizing base are implicit in the Nohara document to the same extent. The explicit teachings of Nohara do not include either the closure or the stabilizing base, and therefore do not anticipate the claim. If the features necessary to render the product of Nohara practically useful are considered to be "inherently present" for the purpose of § 102(b), these would include both a closure for the threaded neck and a stabilizing base for the round bottom, such that the teachings of Nohara would fail to anticipate the unstable container definition. Thus, the Appellant respectfully submits that there is no basis for a rejection of claim 1 or any of its dependent claims 7-9 or 25 under § 102(b) based on Nohara.

For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's first grounds of rejection.

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Atty. Dkt. 3015/2**B. Grounds of Rejection II – 35 USC § 103(a) (Nohara, Esposito, Diekhoff)**

The Examiner has rejected claims 2, 4, 6 and 20-23 under 35 USC § 103(a) as being unpatentable over Nohara et al. in view of Esposito (US 5,071,042) and Diekhoff et al. (US 5,718,352). Appellant's arguments against these grounds of rejection will be presented below according to groups of claims as identified in the subheadings following.

1. Claims 2 and 4

Claims 2 and 4 are dependent from claim 1, which is believed to be patentable for the reasons stated above and below, thereby rendering claims 2 and 4 patentable in their present form. In addition to these arguments, the Appellant argues separately against Grounds of Rejection II as applied to claims 2 and 4 as follows.

The Examiner's rejections of claims 2 and 4 are based on a modification of the bottle of Nohara to employ a non-resealable seal or a ring-pull device according to the teachings of Esposito. In response, the Appellant submits that, according to conventional thinking, a non-resealable seal would in fact be considered inferior to a resealable screw cap as implied by Nohara. Furthermore, the ring-pull of Esposito is chosen for its synergy with use of a metal can, and would not normally be chosen for a plastic bottle. The Examiner has therefore failed to demonstrate any motivation to combine the references, thus failing to meet the requirements for a valid *à priori* obviousness rejection.

2. Claim 6

Claim 6 is dependent from claim 1, which is believed to be patentable for the reasons stated above and below, thereby rendering claim 6 patentable in its present

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form. In addition to these arguments, the Appellant argues separately against Grounds of Rejection II as applied to claim 6 as follows.

The Examiner's rejection of claim 6 is based on a proposed modification of the bottle of Nohara according to which the bottle would be made from metal according to the teachings of Esposito or Diekhoff. This modification, however, would be contrary to the explicit teachings of Nohara which presents a solution for improving gas impermeability of plastic bottles as a preferred option over the metal containers discussed in the background section.

3. Claims 20-23

Independent claim 20 recites a metal can with a ring-pull device and configured such that, after opening, when the metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of the metal can.

The Examiner's rejections of claims 20-23 are fundamentally based upon an assumption that Nohara teaches an unstable beverage container. As detailed above in the context of the § 102(b) rejections above, the Appellant submits that this assumption is erroneous, and that Nohara only discloses an intermediate work product which is to be used with a stabilizing base in a conventional manner. As a result, no reference of record teaches a beverage container which is unstable as claimed herein.

Furthermore, the Examiner's rejection of claim 20-23 is based on a modification of the bottle of Nohara according to which the bottle would be made from metal according to the teachings of Esposito or Diekhoff and would incorporate a ring-pull non-resealable closure. These modifications, however, would be contrary to the explicit teachings of Nohara which presents a solution for improving gas

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impermeability of plastic bottles as a preferred option over the metal containers discussed in the background section.

For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's second grounds of rejection.

C. Grounds of Rejection III – 35 USC § 103(a) (Esposito, Nohara)

The Examiner has rejected claims 1, 2, 4, 6-9, 20-23 and 25 under 35 USC § 103(a) as being unpatentable over Esposito in view of Nohara et al. Appellant's arguments against these grounds of rejection are presented below.

The Examiner has proposed a modification of Esposito in view of Nohara to provide a round-bottomed metal can.

In response, the Appellant submits that Nohara cannot be used to provide a motivation to modify another document to provide a round-bottom since:

- a) Nohara itself does not disclose an unstable bottle but rather merely an intermediate work product, as detailed above.
- b) Even according to the Examiner's argument, Nohara does not breathe a word about any unstable mechanical properties of his product or any advantage such properties would provide. Thus, there is no showing of motivation to modify Esposito according to any supposed unstable-bottle teaching of Nohara.


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For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's third grounds of rejection.

Respectfully submitted,



Mark M. Friedman
Attorney for Applicant
Registration No. 33,883

Date: April 3, 2006

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VIII. CLAIMS APPENDIX

1. An unstable receptacle for storing and dispensing a beverage, comprising:
 - (a) a container having an opening, said container holding a volume of a beverage selected from the group consisting of an alcoholic beverage and a carbonated beverage, said container being formed, such that, when said container is placed in any orientation upon a level surface, at least one third of the volume of said beverage spills out of said container; and
 - (b) a closure arrangement initially sealing said beverage within said container and openable for dispensing said beverage.
2. The receptacle of claim 1, wherein said closure arrangement is configured as a non-resealable seal.
3. The receptacle of claim 2, wherein said non-resealable seal is a crown cap.
4. The receptacle of claim 2, wherein said non-resealable seal is a ring-pull device.
5. The receptacle of claim 1, wherein said container is formed as a glass bottle.

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6. The receptacle of claim 1, wherein said container is formed as a metal can.
7. The receptacle of claim 1, wherein said container has a curved base.
8. The receptacle of claim 7, wherein said curved base has a center of curvature, said container having a center of gravity, said center of gravity being above said center of curvature when said opening of said container is oriented upwards.
9. The receptacle of claim 7, wherein said curved base is formed as a hemisphere.
10. The receptacle of claim 1, wherein said container has a base, said base having an image disposed thereon.
- 11-19. (canceled)
20. An unstable receptacle for storing a volume of a beverage, the receptacle comprising a metal can configured for sealingly containing the volume of the beverage, said metal can being formed with a ring pull device configured for non-resealably opening said metal can in such a manner as to form an opening, wherein said metal can is configured such that, after opening, when said metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of said metal can.
21. The receptacle of claim 20, wherein said metal can has a curved base.

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22. The receptacle of claim 21, wherein said curved base has a center of curvature, said metal can having a center of gravity, said center of gravity being above said center of curvature when said opening of said metal can is oriented upwards.

23. The receptacle of claim 21, wherein said curved base is formed as a hemisphere.

24. The receptacle of claim 20, wherein said metal can has a base, said base having an image disposed thereon.

25. The receptacle of claim 1, wherein said closure arrangement initially seals said beverage within said container together with a quantity of trapped gas at a pressure above atmospheric pressure.

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IX. EVIDENCE APPENDIX

NONE

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X. RELATED PROCEEDINGS APPENDIX

NONE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Applicant:

Gabi Ben-Ami

Serial No.: 10/617,036

Filed: July 11, 2003

For: Unstable Bottle

Examiner: Stephen J Castellano

[illegible]

Group Art Unit: 3727

Attorney
Docket: 3015/2

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APR 03 2006

Commissioner for Patents
PO Box 1450
Alexandria, Virginia 22313-1450
ATTENTION: Board of Patent Appeals and Interferences

APPELLANT'S BRIEF

Sir:

This is in furtherance of the Notice of Appeal filed in this case on February 1, 2006. The fees required under § 1.17(c) and any required petition for extension of time for filing this brief and fees therefor are dealt with in the accompanying TRANSMITTAL OF APPEAL BRIEF.

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I. REAL PARTY IN INTEREST

The real party of interest in this application are the inventors, Gabi Ben-Ami and Uri Adoni.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

III. STATUS OF CLAIMS

The claims under appeal are claims 1-10 and 20-25.

The status of the claims in this application is as follows:

- Claims 1, 2, 4, 6-9, 20-23 and 25 are rejected.
- Claims 3, 5, 10 and 24 are withdrawn from consideration.
- Claims 11-19 are canceled.

IV. STATUS OF AMENDMENTS

No amendments were filed subsequent to the final rejection mailed September 1, 2005.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The invention defined by independent claim 1 under appeal is an unstable receptacle (Title, Figures 1-3) for storing and dispensing a beverage. As shown in Figures 1-3, the receptacle includes a container 12 having an opening 14 (page 5, lines 16-20), the container holding a volume of a beverage selected from the group consisting of an alcoholic beverage and a carbonated beverage, both exemplified by beer (page 1, lines 7-9). The container is formed, such that, when placed in any orientation upon a level surface, at least one third of the volume of the beverage spills

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out of the container (page 6, lines 2-5). A closure arrangement 16 initially seals the beverage within the container and openable for dispensing the beverage (Figure 2 and page 5, lines 19-21).

The invention defined by independent claim 20 under appeal relates to the embodiment of an unstable receptacle shown in Figure 3, and described particularly from page 6, line 14 through page 7, line 7. This embodiment includes a metal can (page 6, line 18) configured for sealingly containing the volume of a beverage. The metal can is formed with a ring pull device 28 (page 6, lines 17-19) configured for non-resealably opening the can in such a manner as to form an opening 25. The metal can is configured such that, after opening, when the metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of the metal can (page 6, line 22 through page 7, line 2).

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection to be reviewed on appeal are as follows:

1. Claims 1, 7-9 and 25 stand rejected under 35 USC § 102(b) as being anticipated by Nohara et al. (US 4,741,936).
2. Claims 2, 4, 6 and 20-23 stand rejected under 35 USC § 103(a) as being unpatentable over Nohara et al. in view of Esposito (US 5,071,042) and Diekhoff et al. (US 5,718,352).
3. Claims 1, 2, 4, 6-9, 20-23 and 25 stand rejected under 35 USC § 103(a) as being unpatentable over Esposito in view of Nohara et al.

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VII. ARGUMENTS

In the arguments presented below, various claims will be grouped together for clarity and conciseness of presentation of the issues before the Board of Patent Appeals and Interferences. To the extent that such grouping is interpreted by the Board as a waiver of separate consideration for the grouped claims, it should be noted that any such waiver is effective only for the purpose of simplifying the issues and reducing attorney costs in the present appeal proceedings, and does not constitute any admission beyond the aforementioned scope. Furthermore, any such waiver is effective only in relation to the rejections of record. The Applicant reserves the right to withdraw any such waiver in the event that any new grounds for rejection are introduced during the appeal procedure.

Introductory Comments

The present invention relates to a receptacle for beverages which provides added entertainment and novelty value through its highly unusual quality of being unstable such that, once started, it generally cannot be put down without spilling until most of the contents are finished. The invention thus also provides a catalyst for social interaction by requiring people to hold each other's drinks whenever one needs to perform an action requiring two free hands.

It is the Appellant's conviction that none of the art of record, when considered either alone or in combination, in any way teaches or suggests this primary inventive concept. The details of the specific rejections of record will now be addressed.

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Atty. Dkt. 3015/2**A. Grounds of Rejection I – 35 USC § 102(b) (Nohara et al.)**

The Examiner has rejected claims 1, 7-9 and 25 under 35 USC § 102(b) as being anticipated by Nohara et al. (US 4,741,936). Appellant's arguments against these grounds of rejection are presented below.

The fundamental issue underlying all of the Examiner's rejections and the Appellant's counter-arguments is the interpretation of the Nohara et al. reference (hereafter "Nohara"). The Examiner's rejections are all premised on the assertion that Nohara teaches an unstable bottle for beverages. The Applicant submits that the Examiner has misconstrued the teachings of Nohara et al., and that the reference does not in fact teach any unstable bottle for containing a beverage.

Nohara teaches a "laminated preform" as a blank for producing multi-layer polyester bottles, and a corresponding production process. The document proposes an improvement to conventional draw-blow-forming of bottles by addition of intermediate layers of resin in the blank to reduce gas permeability. Figures 6 and 7 show two stages of the production process terminating in a bottle within a mold, and Figure 8 shows the round-bottomed bottle after removal from the mold.

The Examiner has pointed to Figure 8 as showing a round-bottomed bottle, thereby allegedly anticipating (or in the later rejections, rendering obvious) the unstable bottle of the present invention. Specifically, on page 2 of the Official Action mailed September 1, 2005, the Examiner stated:

Nohara discloses an unstable receptacle (bottle) for storing and dispensing a carbonated beverage, a lid is placed on the neck finish of the bottle to seal the beverage within the bottle. The container has a hemispherical shaped base. The height of the bottle appears to be high enough that the center of gravity is above the center of curvature of the hemispherical base.

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Thus, the Examiner's rejections are premised on an assumed mode of use of the bottle of Figure 8 in which the round bottomed bottle is taken, as is, without further modification, filled with a carbonated beverage, and sealed with a lid. Such a mode of use would be highly unusual in the context of the background art since it runs contrary to the accepted practice over hundreds of years according to which beverage bottles have always been made to stand stably. Even more mysteriously, the Nohara reference remains completely silent regarding this highly unusual feature which departs markedly from the norms of beverage container design.

The Examiner appears, in his rejections, to be oblivious to the common practice predominant in the field of beverage retail over a period of at least a decade during the 1980s and 1990s according to which blow-molded polymer bottles were initially formed with a round base and a stabilizing base element was then added to make the bottles stand upright. Anyone ordinarily skilled in the art, or even an unskilled layman, reading the document of Nohara would be left in no doubt whatsoever that Nohara is referring to a "bottle" which is to be used by addition of a stabilizing base so as to render the final bottle stable. As is common in patent documents, the Nohara document relates only to those aspects of the technology which are relevant to the laminated bottle production, and omits discussion of other aspects which are well known and irrelevant to the point of novelty. Thus, discussion of the stabilizing base is unnecessary in the same way as is discussion of providing a screw cap.

In order to redress the Examiner's apparent ignorance of the well known practice during the 1980s and 1990s, the Applicant submitted a declaration of Mr. Gideon Feiner, the CEO of Polymer Logistics, and an expert with more than 20 years experience in production and marketing of a wide range of plastic products. This

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declaration, clearly establishes and makes of record a correct reading of the Nohara reference, a reading which the Appellant submits should have been self-evident to the Examiner himself.

Referring now more formally to the § 102(b) rejections, the MPEP in Section 706.02 states that, "...for anticipation under 35 U.S.C. 102, the reference must teach every aspect of the claimed invention either explicitly or impliedly. Any feature not directly taught must be inherently present." [emphasis added]

Independent claim 1 under appeal recites, among other limitations:

- "a container ... formed, such that, when said container is placed in any orientation upon a level surface, at least one third of the volume of said beverage spills out of said container"; and
- "a closure arrangement initially sealing said beverage within said container ...".

The Appellant submits that both the closure and the stabilizing base are implicit in the Nohara document to the same extent. The explicit teachings of Nohara do not include either the closure or the stabilizing base, and therefore do not anticipate the claim. If the features necessary to render the product of Nohara practically useful are considered to be "inherently present" for the purpose of § 102(b), these would include both a closure for the threaded neck and a stabilizing base for the round bottom, such that the teachings of Nohara would fail to anticipate the unstable container definition. Thus, the Appellant respectfully submits that there is no basis for a rejection of claim 1 or any of its dependent claims 7-9 or 25 under § 102(b) based on Nohara.

For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's first grounds of rejection.

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B. Grounds of Rejection II – 35 USC § 103(a) (Nohara, Esposito, Diekhoff)

The Examiner has rejected claims 2, 4, 6 and 20-23 under 35 USC § 103(a) as being unpatentable over Nohara et al. in view of Esposito (US 5,071,042) and Diekhoff et al. (US 5,718,352). Appellant's arguments against these grounds of rejection will be presented below according to groups of claims as identified in the subheadings following.

1. Claims 2 and 4

Claims 2 and 4 are dependent from claim 1, which is believed to be patentable for the reasons stated above and below, thereby rendering claims 2 and 4 patentable in their present form. In addition to these arguments, the Appellant argues separately against Grounds of Rejection II as applied to claims 2 and 4 as follows.

The Examiner's rejections of claims 2 and 4 are based on a modification of the bottle of Nohara to employ a non-resealable seal or a ring-pull device according to the teachings of Esposito. In response, the Appellant submits that, according to conventional thinking, a non-resealable seal would in fact be considered inferior to a resealable screw cap as implied by Nohara. Furthermore, the ring-pull of Esposito is chosen for its synergy with use of a metal can, and would not normally be chosen for a plastic bottle. The Examiner has therefore failed to demonstrate any motivation to combine the references, thus failing to meet the requirements for a valid *à priori* obviousness rejection.

2. Claim 6

Claim 6 is dependent from claim 1, which is believed to be patentable for the reasons stated above and below, thereby rendering claim 6 patentable in its present

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form. In addition to these arguments, the Appellant argues separately against Grounds of Rejection II as applied to claim 6 as follows.

The Examiner's rejection of claim 6 is based on a proposed modification of the bottle of Nohara according to which the bottle would be made from metal according to the teachings of Esposito or Diekhoff. This modification, however, would be contrary to the explicit teachings of Nohara which presents a solution for improving gas impermeability of plastic bottles as a preferred option over the metal containers discussed in the background section.

3. Claims 20-23

Independent claim 20 recites a metal can with a ring-pull device and configured such that, after opening, when the metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of the metal can.

The Examiner's rejections of claims 20-23 are fundamentally based upon an assumption that Nohara teaches an unstable beverage container. As detailed above in the context of the § 102(b) rejections above, the Appellant submits that this assumption is erroneous, and that Nohara only discloses an intermediate work product which is to be used with a stabilizing base in a conventional manner. As a result, no reference of record teaches a beverage container which is unstable as claimed herein.

Furthermore, the Examiner's rejection of claim 20-23 is based on a modification of the bottle of Nohara according to which the bottle would be made from metal according to the teachings of Esposito or Diekhoff and would incorporate a ring-pull non-resealable closure. These modifications, however, would be contrary to the explicit teachings of Nohara which presents a solution for improving gas

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impermeability of plastic bottles as a preferred option over the metal containers discussed in the background section.

For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's second grounds of rejection.

C. Grounds of Rejection III – 35 USC § 103(a) (Esposito, Nohara)

The Examiner has rejected claims 1, 2, 4, 6-9, 20-23 and 25 under 35 USC § 103(a) as being unpatentable over Esposito in view of Nohara et al. Appellant's arguments against these grounds of rejection are presented below.

The Examiner has proposed a modification of Esposito in view of Nohara to provide a round-bottomed metal can.

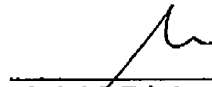
In response, the Appellant submits that Nohara cannot be used to provide a motivation to modify another document to provide a round-bottom since:

- a) Nohara itself does not disclose an unstable bottle but rather merely an intermediate work product, as detailed above.
- b) Even according to the Examiner's argument, Nohara does not breathe a word about any unstable mechanical properties of his product or any advantage such properties would provide. Thus, there is no showing of motivation to modify Esposito according to any supposed unstable-bottle teaching of Nohara.

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For these reasons, the Board of Patent Appeals and Interferences is respectfully requested to reverse the Examiner's third grounds of rejection.

Respectfully submitted,



Mark M. Friedman
Attorney for Applicant
Registration No. 33,883

Date: April 3, 2006

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VIII. CLAIMS APPENDIX

1. An unstable receptacle for storing and dispensing a beverage, comprising:
 - (a) a container having an opening, said container holding a volume of a beverage selected from the group consisting of an alcoholic beverage and a carbonated beverage, said container being formed, such that, when said container is placed in any orientation upon a level surface, at least one third of the volume of said beverage spills out of said container; and
 - (b) a closure arrangement initially sealing said beverage within said container and openable for dispensing said beverage.
2. The receptacle of claim 1, wherein said closure arrangement is configured as a non-resealable seal.
3. The receptacle of claim 2, wherein said non-resealable seal is a crown cap.
4. The receptacle of claim 2, wherein said non-resealable seal is a ring-pull device.
5. The receptacle of claim 1, wherein said container is formed as a glass bottle.

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6. The receptacle of claim 1, wherein said container is formed as a metal can.

7. The receptacle of claim 1, wherein said container has a curved base.

8. The receptacle of claim 7, wherein said curved base has a center of curvature, said container having a center of gravity, said center of gravity being above said center of curvature when said opening of said container is oriented upwards.

9. The receptacle of claim 7, wherein said curved base is formed as a hemisphere.

10. The receptacle of claim 1, wherein said container has a base, said base having an image disposed thereon.

11-19. (canceled)

20. An unstable receptacle for storing a volume of a beverage, the receptacle comprising a metal can configured for sealingly containing the volume of the beverage, said metal can being formed with a ring pull device configured for non-resealably opening said metal can in such a manner as to form an opening, wherein said metal can is configured such that, after opening, when said metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of said metal can.

21. The receptacle of claim 20, wherein said metal can has a curved base.

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22. The receptacle of claim 21, wherein said curved base has a center of curvature, said metal can having a center of gravity, said center of gravity being above said center of curvature when said opening of said metal can is oriented upwards.

23. The receptacle of claim 21, wherein said curved base is formed as a hemisphere.

24. The receptacle of claim 20, wherein said metal can has a base, said base having an image disposed thereon.

25. The receptacle of claim 1, wherein said closure arrangement initially seals said beverage within said container together with a quantity of trapped gas at a pressure above atmospheric pressure.

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IX. EVIDENCE APPENDIX

NONE

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X. RELATED PROCEEDINGS APPENDIX

NONE